

ASSEMBLY BILL

No. 2136

Introduced by Assembly Member Daly

February 20, 2014

An act to amend Section 1624 of the Civil Code, relating to contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 2136, as introduced, Daly. Contracts: statute of frauds.

Existing law prescribes the manner in which contracts may be created. Under existing law, certain contracts are invalid unless the contract, or some note or memorandum of the contract, is in writing and subscribed by the party to be charged. Under existing law, an agreement or contract that is valid in other respects and is otherwise enforceable is not invalid for lack of a note, memorandum, or other writing and is enforceable by way of action or defense, provided that the agreement or contract is a qualified financial contract, as defined, and there is sufficient evidence to indicate that a contract has been made, including, among other alternatives, a written confirmation or the parties have agreed by some other means to be bound by the terms of the qualified financial contract from the time they reached agreement on those terms.

This bill would provide that an electronic message of an ephemeral nature that is not designed to be retained or to create a permanent record, such as a text message or instant message, is insufficient to constitute a contract to convey real property, in the absence of a written confirmation that conforms to a specified requirement of existing law.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1624 of the Civil Code is amended to read:

1624. (a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:

(1) An agreement that by its terms is not to be performed within a year from the making thereof.

(2) A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794.

(3) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged.

(4) An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where the lease is for a longer period than one year, for compensation or a commission.

(5) An agreement that by its terms is not to be performed during the lifetime of the promisor.

(6) An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust upon the property purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property.

(7) A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than one hundred thousand dollars (\$100,000), not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit. For purposes of this section, a contract, promise, undertaking or commitment to loan money secured solely by residential property consisting of one to four dwelling units shall be deemed to be for personal, family, or household purposes.

(b) Notwithstanding paragraph (1) of subdivision (a):

1 (1) An agreement or contract that is valid in other respects and
2 is otherwise enforceable is not invalid for lack of a note,
3 memorandum, or other writing and is enforceable by way of action
4 or defense, provided that the agreement or contract is a qualified
5 financial contract as defined in paragraph (2) and ~~(A) there~~ *one of*
6 *the following apply:*

7 (A) *There* is, as provided in paragraph (3), sufficient evidence
8 to indicate that a contract has been made ~~or (B) the~~.

9 (B) *The* parties thereto by means of a prior or subsequent written
10 contract, have agreed to be bound by the terms of the qualified
11 financial contract from the time they reached agreement (by
12 telephone, by exchange of electronic messages, or otherwise) on
13 those terms.

14 (2) For purposes of this subdivision, a “qualified financial
15 contract” means an agreement as to which each party thereto is
16 other than a natural person and that is any of the following:

17 (A) For the purchase and sale of foreign exchange, foreign
18 currency, bullion, coin or precious metals on a forward, spot,
19 next-day value or other basis.

20 (B) A contract (other than a contract for the purchase of a
21 commodity for future delivery on, or subject to the rules of, a
22 contract market or board of trade) for the purchase, sale, or transfer
23 of any commodity or any similar good, article, service, right, or
24 interest that is presently or in the future becomes the subject of a
25 dealing in the forward contract trade, or any product or byproduct
26 thereof, with a maturity date more than two days after the date the
27 contract is entered into.

28 (C) For the purchase and sale of currency, or interbank deposits
29 denominated in United States dollars.

30 (D) For a currency option, currency swap, or cross-currency
31 rate swap.

32 (E) For a commodity swap or a commodity option (other than
33 an option contract traded on, or subject to the rules of a contract
34 market or board of trade).

35 (F) For a rate swap, basis swap, forward rate transaction, or an
36 interest rate option.

37 (G) For a security-index swap or option, or a security or
38 securities price swap or option.

39 (H) An agreement that involves any other similar transaction
40 relating to a price or index (including, without limitation, any

1 transaction or agreement involving any combination of the
2 foregoing, any cap, floor, collar, or similar transaction with respect
3 to a rate, commodity price, commodity index, security or securities
4 price, security index, other price index, or loan price).

5 (I) An option with respect to any of the foregoing.

6 (3) There is sufficient evidence that a contract has been made
7 in any of the following circumstances:

8 (A) There is evidence of an electronic communication
9 (including, without limitation, the recording of a telephone call or
10 the tangible written text produced by computer retrieval),
11 admissible in evidence under the laws of this state, sufficient to
12 indicate that in the communication a contract was made between
13 the parties.

14 (B) A confirmation in writing sufficient to indicate that a
15 contract has been made between the parties and sufficient against
16 the sender is received by the party against whom enforcement is
17 sought no later than the fifth business day after the contract is made
18 (or any other period of time that the parties may agree in writing)
19 and the sender does not receive, on or before the third business
20 day after receipt (or the other period of time that the parties may
21 agree in writing), written objection to a material term of the
22 confirmation. For purposes of this subparagraph, a confirmation
23 or an objection thereto is received at the time there has been an
24 actual receipt by an individual responsible for the transaction or,
25 if earlier, at the time there has been constructive receipt, which is
26 the time actual receipt by that individual would have occurred if
27 the receiving party, as an organization, had exercised reasonable
28 diligence. For the purposes of this subparagraph, a “business day”
29 is a day on which both parties are open and transacting business
30 of the kind involved in that qualified financial contract that is the
31 subject of confirmation.

32 (C) The party against whom enforcement is sought admits in
33 its pleading, testimony, or otherwise in court that a contract was
34 made.

35 (D) There is a note, memorandum, or other writing sufficient
36 to indicate that a contract has been made, signed by the party
37 against whom enforcement is sought or by its authorized agent or
38 broker.

39 For purposes of this paragraph, evidence of an electronic
40 communication indicating the making in that communication of a

1 contract, or a confirmation, admission, note, memorandum, or
2 writing is not insufficient because it omits or incorrectly states one
3 or more material terms agreed upon, as long as the evidence
4 provides a reasonable basis for concluding that a contract was
5 made.

6 (4) For purposes of this subdivision, the tangible written text
7 produced by telex, telefacsimile, computer retrieval, or other
8 process by which electronic signals are transmitted by telephone
9 or otherwise shall constitute a writing, and any symbol executed
10 or adopted by a party with the present intention to authenticate a
11 writing shall constitute a signing. The confirmation and notice of
12 objection referred to in subparagraph (B) of paragraph (3) may be
13 communicated by means of telex, telefacsimile, computer, or other
14 similar process by which electronic signals are transmitted by
15 telephone or otherwise, provided that a party claiming to have
16 communicated in that manner shall, unless the parties have
17 otherwise agreed in writing, have the burden of establishing actual
18 or constructive receipt by the other party as set forth in
19 subparagraph (B) of paragraph (3).

20 (c) This section does not apply to leases subject to Division 10
21 (commencing with Section 10101) of the Commercial Code.

22 (d) *An electronic message of an ephemeral nature that is not*
23 *designed to be retained or to create a permanent record, including,*
24 *but not limited to, a text message or instant message format*
25 *communication, is insufficient under this title to constitute a*
26 *contract to convey real property, in the absence of a written*
27 *confirmation that conforms to the requirements of subparagraph*
28 *(B) of paragraph (3) of subdivision (b).*